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**OPINION OF THE PUBLIC ACCESS COUNSELOR**

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MARK F. FIALA,  
*Complainant,*

v.

ANDERSON PUBLIC LIBRARY,  
*Respondent.*

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Formal Complaint No.  
23-FC-56

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Luke H. Britt  
Public Access Counselor

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BRITT, opinion of the Counselor:

This advisory opinion is in response to a formal complaint alleging Anderson Public Library violated the Access to Public Records Act.<sup>1</sup> Board president Duane C. Hoak filed an answer on behalf of the library. In accordance with Indiana Code § 5-14-5-10, this office issues the following opinion in response to the formal complaint received July 5, 2023.

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<sup>1</sup> Ind. Code § 5-14-3-1 to -10.

## BACKGROUND

This case involves a dispute over access to records related to a request for proposals (RFP) issued by the Anderson Public Library (APL).

The RFP sought proposals to provide search services for a library director. On June 9, 2023, Mark Fiala (Complainant), president of Organizational Architecture,<sup>2</sup> sought the following public records:

1. The name of your selected vendor
2. Copies of all the proposals submitted
3. Your criteria and scoring criteria and the rating assigned to each proposal
4. Your list of questions asked of each reference, including the ones asked of the other vendors if they differ
5. Responses provided by our references

On June 22, 2023, APL Board president Duane Hoak responded to Fiala's request with responsive records to items 1 and 2. Records responsive to Item 3 did not exist.

This complaint concerns items 4 and 5. Hoak denied production of those records claiming they are considered deliberative materials and not subject to public availability.

On July 5, 2023, Fiala filed a formal complaint seeking disputing APL's response.

On July 27, 2023, APL via Hoak filed its answer to Fiala's complaint. APL advised it was instructed by legal counsel to

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<sup>2</sup> Based on the information provided, Organizational Architecture was an unsuccessful bidder in APL's RFP process.

invoke the deliberative materials exception but did not provide any additional information or argument.

## ANALYSIS

### 1. The Access to Public Records Act (APRA)

It is the public policy of the State of Indiana that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. Ind. Code § 5-14-3-1.5-1.

The Access to Public Records Act (APRA) states that “(p)roviding persons with information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.” *Id.* Anderson Public Library (APL) is a public agency for purposes of APRA; and thus, is subject to the law’s requirements. Ind. Code § 5-14-3-2(n). Unless otherwise provided by statute, any person may inspect and copy APL’s public records during regular business hours. Ind. Code § 5-14-3-3(a).

Under APRA, “public record” means:

any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored

data, or any other material, regardless of form or characteristics.

Ind. Code § 5-14-3-2(r). Here, the records requested by Fiala are public records for purposes of APRA. Although public records are presumptively disclosable, APRA contains both mandatory exemptions and discretionary exceptions to the general rule of disclosure.<sup>3</sup> This case involves the applicability of APRA’s discretionary exception for deliberative materials.

## **2. Deliberative materials exception**

The crux of this dispute is whether APRA’s deliberative materials exception applies to the records requested by Fiala and denied by APL.

APRA gives a public agency discretion to deny disclosure to the following:

Records that are intra-agency or interagency advisory or deliberative material, including material developed by a private contractor under a contract with a public agency, that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision making.

Ind. Code § 5-14-3-4(b)(6). Here, APL denied disclosure of a “list of questions asked of each reference, including the ones asked of the other vendors if they differ” and “[r]esponses provided by our [Organizational Architecture’s] references.”

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<sup>3</sup> Ind. Code § 5-14-3-4(a) and (b).

Typically, items in the procurement process such as final score sheets, final scores, final data, and related materials used in the scoring of the subject RFP can properly be withheld in accordance with APRA's deliberative materials exception. This is due to the internal nature of the decision-making process and the public interest in maintaining the fidelity of those decisions. Therefore, methodology, formulation, and procedures used in decision making are part of the deliberative process. To the extent a public agency relies on the evaluations as part of its systemic appraisal of bids – which appears to be the case – the valuations can be deliberative and meet the definition of the statutory exemption.

The scoring and tabulation are inherently speculative and based upon the subjective estimates and determinations of individual assessors. Therefore, some the materials in question are deliberative.

The question here concerns the questions delivered outside of the agency to third parties and the corresponding responses. The deliberative materials exception only applies to expressions of opinion or of a speculative nature within or between a public agency or agencies. It does not qualify for the exception with outside parties unless there is an established contractual relationship with the externality. See generally *Groth v. Pence*, 67 N.E. 3d 1104, 1123 (Ind.Ct.App.2017).

While internal communication regarding the responses may be withheld, without more, it does not appear as if the material in question qualifies as deliberative material under APRA. Therefore, the APL cannot invoke the exception to deny production of the documents.



## CONCLUSION

Based on the foregoing, it is the opinion of this office that Anderson Public Library disclose the requested records omitted from its initial response in accordance with the Access to Public Records Act.

A handwritten signature in black ink, appearing to read 'LHB', with a long horizontal flourish extending to the left.

Luke H. Britt  
Public Access Counselor

Issued: August 11, 2023